Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

OCTOBER TERM, 1996

DOROTHY A. BASILE,

Petitioner,

against

TOWN OF SOUTHAMPTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state or municipality, as a matter of law, designate a property wetlands and, by its regulations, destroy the value of the property, then acquire it by condemnation and take advantage of its actions by paying a minimal amount because it had destroyed the value?

2. Does this Court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992), preclude a purchaser who acquires property after laws or regulations are adopted from challenging the constitutionality of those laws or regulations as applied to that property?

3. Does a covenant by a property owner which provides that no structure shall be erected on the property unless and until the property is approved as a building lot by the municipality, permit the municipality, upon application being made, to deny to the property, all economically viable, beneficial or productive uses?

NOTICE OF RELATED CASES

On the same day and at the same time that the Court of Appeals for the State of New York decided this case, the Court also rendered opinions in *Kim v. The City of New York,* 2 No. 8, 1997 WL 58593, 65 USWL 2541, (N.Y. Feb. 18, 1997), *Anello v. Zoning Board of Appeals of Village of Dobbs Ferry,* 2 No. 9, 1997 WL 68232 (N.Y. Feb. 18, 1997), and *Gazza v. New York Department of Environmental Conservation,* 2 No. 10, 1997 WL 68590 (N.Y. Feb. 18, 1997).

The common issue in the related cases is that the New York court held, in each case, that where laws or regulations amount to a taking of property without just compensation so that owners would have the right to challenge those laws or regulations, that right is lost upon the transfer of the property to another. None of the parties in the four cases are related. Separate petitions for writs of certiorari are being filed in each case.

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PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

OPINIONS BELOW

The opinion of the Court of Appeals to be reported at ___N.Y.2d___, ___N.E.2d___, ___N.Y.S.2d___ (1997), appears at Appendix A. (p. A-1) The Court of Appeals order granting leave to appeal, reported at ___N.Y.2d___, ___N.E.___, ___N.Y.S.2d___, (July 2, 1996) appears at Appendix B. (p. A-7) The court order dismissing the appeal as of right is reported at 87 N.Y.2d 1054, ___N.Y.S.2d___ (April 2, 1996)

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, dated December 27, 1995, reported at ___A.D.2d___, 636 N.Y.S.2d 97 (2nd Dept. 1995) appears at Appendix C. (p. A-8)

The memorandum decision of the Supreme Court of the State of New York, Suffolk County, dated April 4, 1994, Index No. 92/1584 is not reported. It appears at Appendix D. (p. A-12)

STATEMENT OF JURISDICTION

The final decision of the Court of Appeals of the State of New York, deciding that the mapping of property as a wetlands, prohibiting its use as anything but a wetlands, does not constitute a taking in the hands of a subsequent purchaser, and that a covenant that requires a property owner to seek a permit from the municipality before a structure may be erected, permits the municipality to deny all uses other than the preservation and maintenance of a wetlands without violating the Fourteenth Amendment and the Takings Clause of the Fifth Amendment to the United States Constitution, was entered on February 18, 1997. This petition was timely filed in accordance with Rule 13.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED IN THE CASE

The constitutional provisions involved in the case are the Takings Clause of the Fifth Amendment to the United States Constitution which reads "...; nor shall private property be taken for public use without just compensation" and the portion of the Fourteenth Amendment to the United States Constitution which reads "...; nor shall any State deprive any person of life, liberty, property without due process of law; ..."

The statute involved in the case is Article 25 of the New York State Environmental Conservation Law (the "Tidal Wetlands Act") the pertinent portions of which appear at Appendix E. (p. A-18) Also involved in the case are similar provisions of the Southampton Town Code which appear at Appendix F. (p. A-23)

STATEMENT OF THE CASE AND HOW THE FEDERAL QUESTION WAS PRESENTED

This is a condemnation case involving the destruction, prior to the condemnation, of the value of property by respondent and the State by designating the entire property as wetlands and prohibiting its use as anything but wetlands. Following the designation, respondent acquired the property, by condemnation and appraised the property at a minimal amount because it and the State, by their wetlands regulations, had destroyed the value. Respondent's appraiser attributed to the property, a highest and best use he called "Esthetic," because it was a wetlands, and he defined that term as follows:

> "This is a broad term that I have selected to represent a preservation or non-active use which would be of value to an adjoining owner, private groups (Nature Conservancy, etc.) or to governments (town, village, state, etc.) that purchase tidal wetlands for management and preservation" (Record on Appeal to the New York State Court of Appeals, p. 416-25)

Petitioner submitted a pre-trial memorandum to the trial court asserting that the designation of the entire property as a wetlands and the strict enforcement of the wetlands

regulations to the subject property, permitting nothing but the management and preservation of a wetlands on the property would be an unconstitutional regulatory taking. Petitioner further asserted that the strict enforcement of the regulations, had there been no condemnation, would probably be set aside administratively or, failing that, overturned by the courts in accordance with this Court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 12 S.Ct. 2886 (1992), supra, and as provided for in *Sec. 25-0404 Environmental Conservation Law (ECL).* (Appendix E, p. A-22)

Petitioner submitted an appraisal premised on the fact that the wetlands restrictions could be successfully challenged as an unconstitutional regulatory taking. (Record on Appeal to the Court of Appeals, p. 314-15, 322)

The trial court, by a judge sitting without a jury, rejected petitioner's appraisal and its premise and adopted the appraisal and premise of respondent's appraisal. It held:

> "In view of the fact that the claimant acquired the property when it was already subject to the wetlands restriction and the evidence with respect to the consideration paid for the property in 1980, the last arms length transfer of the property, the Court finds that the claimant's expert incorrectly assumed that a constitutional challenge to the wetlands designation by the claimant or subsequent transferee would likely be successful. Based upon such error, the Court must reject the appraisal submitted by the claimant." (Exhibit D, p. A-16)

> "...In view of the foregoing, the Court finds that the highest and best use of the property is for recreational or aesthetic purposes..." (Record on Appeal to the New York State Court of Appeals, p. 10a) (Appendix D, p. A-17)

Petitioner appealed to the New York State Supreme Court, Appellate Division, Second Department and, in its brief and oral argument to that court, raised the issue of the unconstitutionality of the restrictions that would deny to petitioner's property any economically viable, beneficial or productive use, as determined by this Court in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992), supra, and *Lopes v. City of Peabody,* ___U.S.___, 113 S.Ct. 1574. (Brief for Claimant Appellant [Petitioner] to the New York State Supreme Court-Appellate Division, Second Department, pp. 6-21)

The Appellate Division, in *Basile v. Town of Southampton,* 222 A.D.2d, 638, 636 N.Y.S.2d 97, affirmed the decision of the trial court, saying:

> "The claimant's predecessors in interest and the claimant knew, at the time of the purchase/acquisition in 1980 and 1989, that the property was encumbered by wetland restrictions and might not be buildable. Thus while the claimant conceded and the Town proved that the claimant would be denied a permit to build on the

> property due to the wetlands restrictions,[1] the Town demonstrated that in light of the declaration and the wetlands mapping, the claimant did not have any reasonable investment-backed expectation of building on the property, the potential of building on the property was not part of her title to begin with, and there was no categorical regulatory taking (see, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003; *Gazza v. New York State Dept. of Envir. Conservation,* ___A.D.2d___ [2nd Dept., Dec. 4, 1995]). Accordingly, the Supreme Court properly awarded the claimant the value of the property as restricted by the wetlands regulations (see e.g. *Lucas v. South Carolina Coastal Council, supra; Berwick v. State of New York,* 107 A.D.2d 79, 93; *Chase Manhattan Bank v. State of New York,* 103 A.D.2d 211, 219)." (Record on Appeal to the New York State Court of Appeals, pp. 444-445) (Appendix C, p. A-10)

Petitioner, on April 16, 1996, moved for leave to appeal in the New York State Court of Appeals on the same

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1 The Appellate Division, in its decision, incorrectly stated that Petitioner conceded that she would be denied a permit to build on the property due to the wetlands restrictions. Petitioner's position on the trial and the appeal was that the Town, because denying the permit would be an unconstitutional regulatory taking, would be required to grant a permit pursuant to Art. 25 - ECL and if it were denied, such denial would be overturned in Court.

constitutional grounds recited above. The Court of appeals granted petitioner's motion on July 2, 1996. (Record on appeal to the New York State Court of Appeals, pp. 449-451) (Appendix B, p. A-7)

Petitioner raised the constitutional issues in her brief to the Court of Appeals. Specifically she raised it in "Questions Presented" (pp. 6-8) and the argument. She argued that because the wetlands restrictions, if applied to the subject property, would deprive it of all economically viable use and would, therefore, be successfully challenged, that should have been considered in making the condemnation award. (Petitioner's Brief to the Court of Appeals, Point I, pp. 8-17) She further argued that the principle still applies when the property was purchased after the regulations were adopted and applied to the property. (Petitioner's Brief to the Court of Appeals, Point II, pp. 17-20)

The Court of Appeals affirmed the decision of the Appellate Division, Second Department, holding:

> "...the valuation of claimant's property should reflect the applicable environmental restrictions. Whatever taking claim the prior landlord may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by claimant here who took title after the redefinition of the relevant property interests..." (Appendix A, p. A-3)

The majority and concurring opinions both also made reference to covenants recorded by a predecessor in title saying:

> "...the wetlands restrictions at issue in this case did not deprive claimant of any interest in the property that had not already been encumbered' by virtue of the covenants entered into by the former owner..." (Appendix A, p. A-3)

It should be noted that the trial court never relied on or even referred to the covenant in its decision. (Appendix D, p. A-12) An examination of the covenant referred to (Appendix G, p. A-29) reveals that the property owner agreed he could not build without getting a permit. That is nothing more than a restatement of what a property owner must do in any event and adds nothing to the ordinary burdens of property owners who wish to build.

REASONS FOR GRANTING THE WRIT

This was not a simple affirmance in an isolated case or set of cases. Each of the four petitioners (see p. ii of this petition) had lost at the Appellate Division level and in each case, the Court of Appeals granted leave to appeal. The Court did not just wish to affirm. It wanted to make a statement on the law. That statement, we believe, is in direct conflict with the decisions of four other States and of this Court. The New York trial courts have already heard the statement and are starting to decide cases accordingly. (*Brotherton v. NYSDEC,* Case No. 12809-90, Sup. Ct., Suffolk Cty., IAS 8, 2/24/97)

In June, 1992, this Court, in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, supra, said that regulation of land is compensable, "where regulation denies all economically beneficial or productive use of land" (505 U.S. 1015, 112 S.Ct. 2893, supra). New York State, in

this case and in the three others decided on the same date, has carved out an exception to that rule. It has decided that that rule applies only when the property is in the hands of the owner at the time the confiscatory regulations were adopted and that, should the property be sold or transferred to another, with the regulations in place, that subsequent purchaser or transferee could not challenge the constitutionality of those regulations, regardless of how confiscatory those regulations might be.

This exception, through the back door, nullifies this Court's decision in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886, supra. If a potential purchaser may not, upon purchase of property that is unconstitutionally restricted, challenge that unconstitutional restriction, he or she will not purchase the property. The practical effect is that the property, in the hands of the original owner, has been rendered unmarketable and thereby, valueless.

The decision of the New York Court of Appeals is also directly in conflict with this Court's decision in *Lopes v. City of Peabody,* ___U.S.___, 113 S.Ct. 1574, (1993) supra, which was decided after an intermediate appellate court in Massachusetts made the same decision as the New York courts have in this case. (*Lopes v. City of Peabody,* 32 Mass. App. Ct. 1124, 595 N.E.2d 812 (1992) rev. den. 413 Mass. 1105, 600 N.E.2d 171 (1992)) This Court granted certiorari, vacated the judgment and remanded the case to the Massachusetts Court of Appeals, "for further consideration in light of Lucas..." (___U.S.___, 113 S.Ct. 1574, (1993), supra)

Further, this decision of the New York State Court of Appeals is in conflict with the decisions of the Courts of at least four other states. Following the remand by this Court in *Lopes v. City of Peabody,* ___U.S.___, 113 S.Ct., 1574,

(1993) supra, the Supreme Judicial Court of Massachusetts, transferred the case to itself and in *Lopes v. City of Peabody,* 417 Mass. 299, at pages 303, 304 and 306, 629 N.E.2d 1312 (1994) held that it does not matter that the property was purchased with knowledge that wetlands restrictions had been in place for six years. Michigan has held similarly in *K & K Construction, Inc. v. Department of Natural Resources,* 217 Mich. App. 56, 64, 551 N.W.2d 413, 417 (Ct. App. Mich, 6/4/96) as has New Jersey in *Moroney v. Mayor and Council of the Borough of Old Tappen (N.J.),* 268 N.J. Super. 458, 633 A.2d 1045, 1048 (N.J. Super A.D., 1993) and Florida in *Vatalaro v. Department of Environmental Regulation,* 601 So.2d 1223 (5th Dist. Fla., 1992) review den. 613 So.2d 3 (Fla. 1992).

For these reasons as well as to clarify what this Court was referring to in Lucas when it discussed "reasonable investment-backed expectations" and what is "part of his title to begin with," we respectfully urge this Court to review the decision below.

ARGUMENT

POINT I

THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THERE IS A DIRECT CONFLICT BETWEEN THE NEW YORK COURT OF APPEALS AND FOUR STATES ON THE QUESTION OF WHETHER THE CONSTITUTIONAL RIGHT TO CHALLENGE A REGULATORY TAKING IS LOST UPON THE TRANSFER OF THE AFFECTED PROPERTY.

A. The decision in *Basile v. Town of Southampton* conflicts directly with the Supreme Judicial Court of Massachusetts holding that a purchaser of property with regulatory restrictions in place has the same right as the predecessors in title to challenge the constitutionality of the restrictions as applied to his or her property.

No two cases could be more similar in their facts than *Basile v. Town of Southampton* (2 No. 11, 1997, WL. 68581 (N.Y. Feb. 18, 1997)) and *Lopes v. City of Peabody,* (32 Mass. App. Ct. 1124, 595 N.E.2d 812 (1992) review denied, 413 Mass. 1165, 600 N.E.2d 171 (1992), cert. granted and judgment vacated, 113 S.Ct. 1574 (1993), on remand, 417 Mass. 299, 629 N.E. 1312 (1994)) and no two cases could have more dissimilar results, solely because of the states in which the cases were decided. In Basile, as well as Lopes, the property was mapped as wetlands prior to the purchase. In

both cases, no use could be made of the property except the preservation of the property as wetlands. In the Basile case, this was admitted by respondent in its appraisal (see p. of this petition), and was the basis of its value in the condemnation trial. It was also the basis of the condemnation award by the trial court. This Court said, in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, at 101, 112 S. Ct. 2894-2895, supra:

> "On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use — typically, as here, by requiring land to be left substantially in its natural state — carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."

In the *Lopes* case, the Massachusetts Appeals Court upheld the wetlands restrictions as applied to Lopes' property for, among other reasons, Lopes had purchased the property with full knowledge of its location in the restricted district (32 Mass. App. Ct. 1124, 595 N.E.2d 812 [1992], unpublished). This is the same holding as that of the New York Court of Appeals in the Basile case and the three related cases. (See p. ii of this petition)

After the Supreme Judicial Court of Massachusetts denied Lopes' application for further review (413 Mass. 1105, 600 N.E.2d 171 [1992], this Court granted Lopes' petition for a writ of certiorari, reversed, vacated the judgment and

remanded the case to the Appeals Court "for further consideration in light of [the Lucas case]." Although it was not explicitly stated, implicit in this, we understood, was the determination by this Court that it did not matter that the purchase of the property was made, by Lopes, with its location already in a regulated wetlands district. Lopes was in the same legal and constitutional position as Lucas.

The Supreme Judicial Court of Massachusetts apparently understood this Court's remand as we did for it then granted a request for direct review and held:

> "...Lopes, a purchaser of land subject to the restriction at the time of his purchase, has every right to challenge the continued application of the restriction. (Citing case) We see no reason to permit challenges to the validity of a zoning enactment only by those landowners who owned land when the zoning first affected it. A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances and tend to press owners to bring actions challenging any zoning provisions of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-guilt pattern of the enforceability of a zoning law intended to have uniform applicability." *Lopes v. City of Peabody*, 417 Mass. 299 at 303, 629 N.E.2d 1312 at 1314-1315, supra.

In conflict with this, the New York Court of Appeals held, in the instant case:

> "Enactments which are legitimate exercises of police power, such as the wetlands regulations here, do not effect a taking when a purchaser acquires property subject to such regulations. `The relevant property interest owned by a [purchaser] are defined by those state laws enacted and in effect at the time [title is taken] and they are not dependent on the timing of state action pursuant to such law.' (Citing Gazza, decided the same day) Since claimant took title to her property subject to wetlands regulations and the encumbrances of certain covenants,[2] she cannot claim the value of her property without such restrictions." (Appendix A, p. A-3)

There is a direct conflict between the decisions of the Massachusetts and New York Courts and it should be resolved by this Court.

B. The decision in *Basile v. Town of Southampton* conflicts directly with the Court of Appeals of Michigan holding that the right to challenge the constitutionality of wetlands regulations is transferred to the purchaser on the sale of the property when the restrictions were placed on the property prior to the sale.

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2 The covenant referred to is included in a recorded declaration (Appendix G, p. A-29) and is discussed at p.8 & 20 of this petition.

In *K & K Construction, Inc. v. Dept. of Natural Resources,* 217 Mich. App. 56, 551 N.W.2d 413, (1996), supra, a case involving a regulatory taking, the property owner sought and was denied a permit to build a restaurant on a part of its property, part of which was determined to be protected wetlands under the *Wetland Protection Act (WPA), M.C.L.* Sec. 281.701, et seq.; M.S.A. Sec. 18.595(51) et seq. Plaintiffs sought a determination that the denial constituted a taking for which they were entitled to just compensation. The trial court determined that the wetlands restrictions rendered the property essentially worthless as commercial real estate and the plaintiffs were therefore entitled to just compensation which was awarded.

The Dept. Of Natural Resources, on appeal, argued, inter alia, that because K & K received title to the property after the regulation was enacted, it is precluded from compensation. The Court of Appeals of Michigan, citing this Court's decision in *Nollan v. California Coastal Commission,* 483 U.S. 825, 833, n. 2, 107 S.Ct. 3141, 3147 n.2, 97 L.Ed.2d 677 (1987) held that as long as the owner in title at the time the restrictive regulations were enacted could not be deprived of just compensation, upon transfer of title to another, the full property rights, including the right to challenge the constitutionality of the regulations, as applied to the subject property, were transferred as well.

Here too, there is a direct conflict between the decisions of the Michigan and New York Courts which should be resolved by this Court.

C. The decision in *Basile v. Town of Southampton* conflicts directly with the decision of the Superior Court of New Jersey, Appellate

Division, that when an owner of property possesses the right to assert a taking by virtue of a restrictive regulation, the right to assert the taking passes with the title upon transfer of the property.

In *Moroney v. Mayor and Council of the Borough of Old Tappen*, 268 N.J. Super. 458, 633 A.2d 1045 (1993), cert. denied, 136 N.J. 295, 642 A.2d 1004 (1994), supra, the property had been, long before it was purchased, zoned so that it was undersized and could not be built upon without a variance. An application for a hardship variance was denied. The denial was upheld on appeal because the zoning advanced legitimate state interests but the same judge, as a result of that decision, entered judgment in favor of plaintiffs for inverse condemnation because the property was rendered useless. On appeal, the Superior Court of New Jersey, Appellate Division, affirmed, holding that the property owners stand in the shoes of their predecessors in title and to the extent that the predecessors would have had the right to assert the taking, that right passes with the title upon transfer of the property.

D. The decision in *Basile v. Town of Southampton* conflicts directly with the decision of the District Court of Appeal of Florida which held that denying a building permit to one who purchases after restrictive regulations have been adopted is a taking, requiring just compensation.

In *Vatalaro v. Department of Environmental Regulation*, 601 So.2d 1223 (5th Dist. Fla. 1992), rev. den., 613 So.2d 3 (Fla., 1992) as with the Lopes case in Massachusetts, the facts

were virtually identical to the Basile case in that Vatalaro bought her property after the regulations requiring it to be left in its natural wetlands state was adopted. However, as with Lopes, the results could not be more different, as the District Court of Appeal ruled that the denial of a permit to build a residence and a septic tank denied to Mrs. Vatalaro, all economically viable uses and was a taking requiring just compensation. As with Lopes and Basile, the difference is the state making the decision.

As with Massachusetts, Michigan and New Jersey, the decision of the New York Court of Appeals is in direct conflict with the decision of the District Court of Appeal of Florida, Fifth District, and should be resolved by this Court.

POINT II

THIS COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THE DECISION OF THE NEW YORK COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN REGULATORY TAKING CASES.

A. The decision of the New York Court of Appeals not only permits the taking of property of subsequent purchasers without just compensation but property of the original owner as well, thereby effectively nullifying, through the back door, this Court's regulatory takings decisions.

This Court has, since 1922, repeatedly decided that regulations which deny to property owners, all economically viable, beneficial or productive uses of their property, rendering them thereby, valueless, constitute a taking of property without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution. (*Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158 (1922); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 98 S.Ct. 2646 (1978); *Kaiser Aetna v. United States,* 444 U.S. 164, 100 S.Ct. 383 (1979); *Nollan v. California Coastal Commission,* 483 U.S. 825, 107 S.Ct. 3141 (1987); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 112 S.Ct. 2886 (1992), supra).

The Takings Clause of the Fifth Amendment has been made applicable to the States through the Fourteenth

Amendment. *Chicago Burlington & Quincy Railroad Company v. Chicago,* 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed 979 (1897).

In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 43 S.Ct. 158, (1922) supra, the first regulatory takings case, Justice Holmes said, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." In the Basile case, the regulations, upheld by the Court of Appeals, permitted no use for the entire property, other than the preservation and management of the property as wetlands. It is difficult to imagine a regulation that can go farther than that.

This Court refined the doctrine further in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 at 1019 when it said, "...when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." The reason for this doctrine is that by taking away, from property, all economically viable, beneficial or productive uses, the government has taken away virtually all of the value of that property.

If the original owner of the property has the right to challenge the wetland regulations as an unconstitutional taking without just compensation but a potential purchaser will not have that right, who is going to purchase the property? If the decision of the New York Court of Appeals in the Basile case and the three other cases decided on that date is the law, no one will buy the property for they will be allowed no economically viable, beneficial or productive use. The property in the hands of the original owner, by virtue of this New York decision, has become unmarketable and, thereby,

valueless, effectively nullifying Lucas and the long line of regulatory taking cases decided by this Court.

B. The holding of the New York Court of Appeals that the existence of the covenant bars petitioner from challenging the denial of the right to use the property for any economically viable, beneficial or productive use is in conflict with prior decisions of this Court.

The Declaration referred to in the opinion and concurring opinion of the Court of Appeals, which was signed and recorded by petitioner's predecessor in title, contains five covenants (Appendix G, pp. A-30 & A-31). The first covenant is the only one that is of concern in this case. It states, in its entirety, "That no building or structure shall be erected on Parcel No. 4 as described in Schedule A, [the subject property] unless and until said Parcel No. 4 is approved as a building lot by the Planning Board of the Town of Southampton."[3]

This covenant declares to the world, including subsequent purchasers such as petitioner, that in order to build on the property, they must come to the Planning Board to get a permit. The covenant, by its terms, put subsequent purchasers of the subject property in the same position as all similar applicants. It changed nothing. All property owners, at least all property owners in New York, must apply to the appropriate board in the municipality for a permit before they may build on their property. The fact that the covenant restates this does not confer upon the municipality the right to deny the

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3 The Court of Appeals also referred to the preamble which is part of the Declaration but not one of the covenants.

permit if, by doing so, they would deny to the property all economically viable, beneficial or productive uses of the property for, as this Court has said, in the cases cited in Point IIA, that would be a taking in violation of the Takings Clause of the Fifth Amendment. If it gives municipalities that right, it gives them the right to deny all economically viable, beneficial or productive uses to all property owners, for all owners must come to the municipality for a permit and may not build unless and until that permit is granted.

The covenant did not, by its terms, explicitly reserve to the Planning Board the right to deny the permit. Nor did it deny, at that time, the right to build on the property. Had it done so, it would be in conflict with this Court's decision in *Nollan v. California Coastal Commission,* 483 U.S. 825, at 833 n.2, 107 S.Ct. 3141, at 3197, n.2, supra, where it said:

C. The decision of the New York Court of Appeals in Basile v. Town of Southampton is in direct conflict with decisions of this Court.

The decision of the New York Court of Appeals, to the effect that what would constitute a taking of property in the hands of the original owner is not a taking in the hands of a subsequent purchaser or owner, is in direct conflict with this Court's decision in *Nollan v. California Coastal Commission,* 483 U.S. 825, at 833, n.2, 107 S.Ct. 3141, at 3147, n. 2, (1987), supra, where it said:

> "Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating

> them, the prior owners must be understood to have transferred their full property rights in conveying the lot."

Further, this Court, in *Lopes v. Peabody*, ___U.S.___, 113 S.Ct. 1574 (1993), supra, following the decision of the Massachusetts Appeals Court, which had upheld the City of Peabody's wetlands restrictions as applied to Lopes' property because, inter alia, Lopes had purchased the property six years after the restrictions were in place (32 Mass. App. Ct. 1124, 595 N.E.2d 812 (1992), supra), granted certiorari, vacated the judgment and remanded the case to the Appeals Court. Apparently, the Supreme Judicial Court of Massachusetts understood this Court's decision to mean that if a regulation of property amounts to a taking, it does not change because the property has changed hands. The New York Court of Appeals, in Basile v. Town of Southampton, and the three other cases with a similar issue decided on February 18, 1997, did not understand this Court's decision in Lopes the same way, as its decisions are in direct conflict with the understanding of the Massachusetts, Michigan, New Jersey and Florida Courts. Whichever of the two understandings this Court intended in *Lopes v. Peabody*, ___U.S.___, 113 S.Ct. 1574 (1993), supra, apparently needs to be made more explicit and perhaps it needs more than the footnote in *Nollan v. California Coastal Commission*, 483 U.S. 825, at 833, n.2, 107 S.Ct. 3191, at 3147, n.2 (1987), supra.

CONCLUSION

To resolve the conflicts between New York and Massachusetts, Michigan, New Jersey and Florida, to clarify the understanding of this Court's decisions and to provide necessary uniform guidance on an increasingly important principle of Federal Constitutional law, this Court should grant the petition for writ of certiorari.

Dated: New York, New York
May 15, 1997

Respectfully Submitted,

MICHAEL J. GOLDSTEIN
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Dorothy A. Basile
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APPENDICES

APPENDIX A

State of New York
Court of Appeals

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2 No. 11
Dorothy A. Basile,

Appellant,

v.

Town of Southampton,

Respondent.

MEMORANDUM
This memorandum is uncorrected and subject to revision before publication in the New York Reports.

Michael J. Goldstein, for appellant.
Wayne D. Bruyn, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs.

In 1980, claimant's family acquired 12 acres of property situated near Moriches Bay in the Town of Southampton. At that time, the land was zoned for residential development and subject to further regulation because of its location within the Tidal Wetlands and Ocean Beach Overlay District and the Tidal Floodplain Overlay District. In fact, over 95% of the

parcel consists of tidal wetlands as inventoried pursuant to the Tidal Wetlands Act (ECL § 25--0201).

The 1980 purchase was made subject to certain covenants which had been filed by the former owner in the Suffolk County Clerk's Office. These covenants stated that the parcel "may consist of wetlands and may not be suitable for erection of a dwelling thereon." The covenants further stated that "no building or structure shall be erected on [the parcel] unless and until said [parcel] is approved as a building lot by the Planning Board of the Town of Southampton."

In 1990, respondent Town of Southampton acquired from claimant Basile, by condemnation, the fee title ownership to the parcel. The Town's appraiser initially valued the land at $128,000 and an advance payment was made in that amount to claimant (EDPL § 304). The Town later revised its appraisal to $117,500 and claimant submitted a counter-appraisal listing the property value at $960, 000. The wide disparity between the valuations submitted by the parties stems primarily from the fact that only the respondent's estimate reflects the property value as restricted under the wetlands regulations. Supreme Court warded claimant $117,500.[1]

Claimant argues that the wetland regulations which decreased the market value of her property effect an unconstitutional taking (US Const, Amend V; NYS Const, Art 1 § 7), and the formal condemnation proceeding requires just compensation of the pre-regulatory property value. Respondent counters that it is the property value, as restricted,

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Respondent has not sought the difference between the advance payment and the award by Supreme Court. Claimant retains those funds.

which must dictate the amount of compensation in a condemnation proceeding.

Generally, upon condemnation, property value should be calculated with due consideration paid to the applicable restrictions upon use (*cf. Town of Islip v Mascioli*, 49 NY2d 354, 360 ["Ordinarily the potential uses the court may consider in determining value are limited to those uses permitted by the zoning regulations at the time of taking"]). Here, the valuation of claimant's property should reflect the applicable environmental restrictions. Whatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by claimant here who took title after the redefinition of the relevant property interests. Moreover, as the concurrence notes, "the wetlands restrictions at issue in this case did not deprive claimant of any interest in the property that had not already been encumbered" by virtue of the covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel.

Enactments which are legitimate exercises of police power, such as the wetlands regulations here, do not effect a taking when a purchaser acquires property subject to such regulations. "The relevant property interests owned by a [purchaser] are defined by those state laws enacted and in effect at the time [title is taken] and they are not dependent on the timing of state action pursuant to such law" (*Gazza v New York State Dept. of Environmental Conservation*, (___NY2d___[opn at 13] [decided today]). Since claimant took title to her property subject to wetlands regulations and the encumbrances of certain covenants, she cannot claim the value of the property without such restrictions.

WESLEY, J.: (Concurring)

For the reasons set forth in my dissenting opinion in *Anello v Zoning Board of Appeals* (___NY2d___[decided today), I cannot agree that claimant is prevented from claiming the value of her property without the wetlands regulations solely because she took title after the enactment of those regulations. Nevertheless, I concur in the result reached by the majority, because the claimant took title subject to the covenants filed by the former owner of the property, which substantially restrict the value and use of the property.

Even if we were to accept claimant's argument that the property must be valued as if it could be developed for one or more single-family residences because the alternative use for recreational or aesthetic purpose is not an economic use (*cf., Lucas v South Carolina Coastal Council,* 505 US 1003, 1044 [Blackmun, J., dissenting]), that is a consequence of the covenants entered into by the former owner in exchange for the right to subdivide and develop what was then a larger parcel. The wetlands regulations at issue in this case did not deprive claimant of any interest in the property that had not already been encumbered by the former owner by virtue of the covenants. As such, an unrestricted right to develop the parcel no longer remained in the "bundle" of rights that claimant acquired through the former owner, and Supreme court properly determined that the Town need not compensate claimant as if she retained that right.

Order affirmed, with costs, in a memorandum. Chief Judge Kaye and Judges Bellacosa, Smith, Levine and Ciparick concur. Judge Wesley concurs in result in an opinion. Judge Titone took no part.

Decided February 18, 1997

Court of Appeals
State of New York

The Hon. Judith S. Kaye, Chief Judge, Presiding

2 No. 11

Dorothy A. Basile,

Appellant,

v.

Town of Southampton,

Respondent.

COPY/stamp

The appellant in the above entitled appeal appeared by Goldstein Goldstein & Rikon, P.C.; the respondent appeared by Wayne D. Bruyn, Esq., Southampton Deputy Town Attorney.

The Court, after due deliberation, orders and adjudges that the order is affirmed, with costs, in a memorandum. Chief Judge Kaye and Judges Bellacosa, Smith, Levine and Ciparick concur. Judge Wesley concurs in result in an opinion. Judge Titone took no part.

The Court further orders that this record of the proceedings in this Court be remitted to the Supreme Court, Suffolk County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/signature/
Stuart M. Cohen, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 18, 1997

APPENDIX B

449

DECISION OF COURT OF APPEALS, DATED JULY 2, 1996

State of New York
Court of Appeals

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION July 2, 1996

2-10 Mo. No. 561
Motion for leave to appeal granted.

Dorothy A. Basile,

Appellant,

v.

Town of Southampton,

Respondent.

APPENDIX C

444
DECISION & ORDER OF APPELLATE DIVISION - SECOND DEPARTMENT, DATED DECEMBER 29, 1995

[Pages 444-446]

0771Z
S/hu
Argued - December 5, 1995

— AD2d —

ALBERT M. ROSENBLATT, J.P.
DAVID S. RITTER
EDWARD J. HART
GABRIEL M. KRAUSMAN, JJ.

94-05588

Dorothy A. Basile, appellant
v Town of Southampton, respondent

DECISION & ORDER

Goldstein, Goldstein & Rikon, New York, N.Y. (Michael J. Goldstein of counsel), for appellant.

Wayne D. Bruyn, Deputy Town Attorney, Southampton, N.Y., for respondent.

In a condemnation proceeding, the claimant appeals on the ground of inadequacy, from an order and judgment (one paper) of the Supreme Court, Suffolk County (Werner, J.), dated May 5, 1994, which upon adopting the valuation of the respondent's expert, awarded her only $117,500, the value of the property as restricted by wetlands regulations, and failed to award her an increment for the reasonable probability of a successful challenge to the wetlands regulations as confiscatory.

ORDERED that the order and judgment is affirmed, with costs.

In April 1980 the claimant's husband paid $88,500 for 11.5 acres of property located in Remsenburg, in the Town of Southampton. At the time of his purchase, he was aware of a declaration dated January 8, 1976, which was made by his predecessor in interest who sought subdivision approval of the property. Pursuant to the declaration, the Planning Board of the Town of Southampton (hereinafter the Planning Board) permitted the subdivision of the property into four parcels and it approved Parcel Nos. 1, 2, and 3 as building lots. As to Parcel No. 4, however, the declaration provided that the Planning Board "is not willing at this time to approve Parcel No. 4 *** as a building lot because it may consist of wetlands and may not be suitable for erection of a dwelling thereon". The declaration also stated "[T]hat no building or structure shall be erected on Parcel No. 4 *** unless and until said Parcel No. 4 is approved as a building lot by the Planning Board of the Town of Southampton".

On September 14, 1977, after the date of the declaration but prior to the property's purchase by the claimant's husband, the New York State Department of Environmental

Conservation (hereinafter the DEC) adopted a Tidal Wetlands Inventory Map which encompassed the property. After the claimant's husband purchased the property in 1980, the DEC remapped wetlands in the area pursuant to a decision and order of the commissioner of the DEC issued February 6, 1986. Thereafter, the property was transferred for no consideration among family members, until the claimant acquired it in 1989, also for no consideration. The respondent Town of Southampton (hereinafter the Town) acquired title through condemnation by vesting order recorded March 8, 1990.

The claimant's predecessors in interest and the claimant knew, at the time of the purchase/acquisition in 1980 and 1989, that the property was encumbered by wetland restrictions and might not be buildable. Thus, while the claimant conceded and the Town proved that the claimant would be denied a permit to build on the property due to the wetland restrictions, the Town demonstrated that in light of the declaration and the wetlands mapping, the claimant did not have any reasonable investment-backed expectation of building on the property, the potential of building on the property was not part of her title to begin with, and there was no categorical regulatory taking (*see, Lucas v South Carolina Coastal Council* 505 US 1003; *Gazza v New York State Dept. of Envir. Conservation, ___AD2d___* [2nd Dept. Dec. 4, 1995]). Accordingly, the Supreme Court properly awarded the claimant the value of the property as restricted by the wetlands regulations (*see e.g. Lucas v South Carolina Coastal Council, supra; Berwick v State of New York*, 107 AD2d 79, 93; *Chase Manhattan Bank v State of New York*, 103 AD2d 211, 219).

ROSENBLATT, J.P., RITTER, HART and KRAUSMAN, JJ., concur.

94-05588

Dorothy A. Basile, appellant
v Town of Southampton, respondent.

DECISION & ORDER ON MOTION

Motion by the appellant on an appeal from an order and judgment (one paper) of the Supreme Court, Suffolk County, dated May 5, 1994, to strike stated portions of respondent's brief on the ground, *inter alia, that* it contains or refers to matters dehors the record. By decision and order on motion dated April 3, 1995, the motion was held in abeyance and referred to the Justices hearing the appeal for determination upon the argument or submission of the appeal.

ORDERED that the motion is denied.

ROSENBLATT, J.P., RITTER, HART and KRAUSMAN, JJ., concur.

ENTER:

Martin H. Browsteinl
Clerk

APPENDIX D

MEMORANDUM

SUPREME COURT, SUFFOLK COUNTY
SPECIAL TERM

DOROTHY BASILE,

Claimant,

-against-

TOWN OF SOUTHAMPTON

Respondent.

By BAISLEY J.S.C.

Dated April 4, 1994
Index #92/1584
Submitted 11/10/93
CDISPSJ

SAMUEL GOLDSTEIN, & SONS, ESQS.
Attorneys for Claimant
80 Pine Street
New York, New York 10005-1771

JOHN C. BIVONA, ESQ.
Attorney for Respondent
44 Elm Street
Huntington, New York 11743

This is a proceeding to determine a claim for damages arising from the acquisition of real property by the Town of Southampton. The parties tried this matter before the Court on June 22, 1993. The claimant submitted a pre-trial memorandum. At the conclusion of the trial, the parties ordered the transcript for the Court. Counsel for the claimant represented that there would be no further memorandum or evidence submitted by the claimant. The Court granted counsel for the Town leave to submit a memorandum within four weeks after submission of the transcript. The court received the transcript on August 10, 1993. The Court did not receive any memorandum on behalf of the Town. However, since this proceeding involves primarily the determination of an issue of law, the Court delayed marking the matter submitted, in anticipation of receiving a memorandum on behalf of the Town. When no such memorandum came, the Court marked the matter submitted on November 10, 1993.

The Town acquired title to the property at issue pursuant to a vesting order of this Court dated March 1, 1990. The property consists of approximately twelve acres of undeveloped land. The appraiser for the Town has placed a value of $117,500.00 on the property. The appraiser for the claimant valued the property at $960,000.00. The difference in such values is primarily the result of one fact: The property is almost entirely classified as wetlands pursuant to he Tidal Wetlands Act. Thus, although the property is zoned for residential development by the Town of Southampton, the wetlands classification prohibits the use of the property for residential development.

The appraisal figure adduced by the Town is based upon the value of the property as restricted. The appraisal upon which the claimant relies is based upon a calculation of the

difference between the value of the property as zoned and without any wetlands restriction and the value as restricted by the wetlands designation. The claimant's expert then reduced such difference by ten percent on the basis that the owner or purchaser of the property would have to have the wetlands restriction nullified by an action in court. The expert specifically notes that the ten percent figure is based on the assumption that "a reasonable probability exists in a successful outcome." The claimant's expert then divided the foregoing figure by the value of the property as restricted to produce a multiplier. By applying the multiplier to the value of the property as restricted by the wetlands designation, the claimant's expert valued the market value of the property, as presently zoned and restricted by the wetlands designation, at $960,000.00. The claimant asserts that the expert's calculation of value is based upon the precedents set in *Chase Manhattan Bank vs. State of New York*, 103 A.D. 2d211, 479 N.Y.S. 2d983 (2d Dept. 1984), *Berwick vs. State of New York*, 107 A.D. 2d79, 486 N.Y.S. 2d 260 (2d Dept. 1985), and *Berwick vs State of New York*, 159 A.D. 2d 544, 552 N.Y.S. 2d 409 (2d Dept. 1990).

The Court finds that several factors are present in the instant matter which apparently was not present in the precedents upon which the petitioner relies. In the instant matter, it appears that the property at issue was restricted by the wetlands restriction for a significant period prior to the time that the claimant acquired the property. In addition, the evidence indicates that the claimant has title to the property by virtue of a deed dated, March 10, 1989 from Richard B. Brasile and the claimant to the claimant alone. The transfer was for no consideration. Richard B. Brasile and the claimant had acquired title to the property from Keith Gaskell, Teresa

Gaskell, Richard B. Brasile, and the claimant, as tenants in common, by deed dated June 16, 1986. Again, the property was transferred without consideration. The grantors in such transaction acquired title to the property from Keith Gaskell and Teresa Gaskell by deed dated December 27, 1985. The transfer was for no consideration. The grantors in the 1985 transaction acquired title by deed dated May 18, 1984 for no consideration. The grantor in the 1984 transaction acquired title by deed dated June 11, 1981 for no consideration. Both parties apparently agree that all of the above transfers of the property were between members of the same extended family. In addition, the record indicates that the grantor in the 1981 transfer, Richard Basile, acquired title to the property from Tuthill Associates, a partnership, pursuant to a deed dated April 18, 1980. The evidence also indicates that the consideration for such transfer was $88,500.00 It appears from the record that such transfer was an arm's length transaction not involving related parties.

As noted previously, the conclusion of the claimant's expert with respect to the value of the property for the purpose of determining the just compensation due the claimant is dependent upon the assumption that a constitutional challenge to the wetlands designation on the property would likely be successful. Thus, the claimant's expert only discounted the difference between the unrestricted and restricted values of the property by a figure of ten percent for the required legal action. However, as noted above, it appears that the property was classified as wetlands for a significant period of time before the claimant acquired the property. This is not an instance where the property has been reduced in value by the promulgation of a land use restriction after the claimant acquired the property. In such an instance, the Court cannot

determine that the restriction at issue is confiscatory as to the claimant without evidence of the market value at the time of acquisition. See *Curtiss-Wright Corporation vs. Town of East Hampton*, 82 A.D.2D 551, 442 N.Y.S 2d 125 (2d Dept. 1981).

The claimant acquired title to the property in 1989 for no consideration. If the Court ignores such transaction and the other previous inter-family transactions as not being representative of the fair market value of the property, the Court is left with the 1980 arm's length transfer of the property from Tuthill Associates to Richard Basile. The consideration for such transfer was $88,500.00.

In view of the fact that the claimant acquired the property when it was already subject to the wetlands restriction and the evidence with respect to the consideration paid for the property in 1980, the last arm's length transfer of the property, the Court finds that the claimant's expert incorrectly assumed that a constitutional challenge to the wetlands designation by the claimant or subsequent transferee would likely be successful. Based upon such error, the Court must reject the appraisal submitted by the claimant.

In further support of the foregoing conclusion, the Court notes that its primary purpose in this proceeding is to determine the just compensation due the claimant for the appropriation of the property at issue. See Constitution of the State of New York, Article 1, §7. The Court's function is not to determine the issue of whether the property was confiscated by the wetlands designation promulgated by the State of New York. In view of the evidence regarding the consideration paid for the property by the claimant's predecessor in title in the last arm's length transaction in 1980, the Court rejects the

claimant's appraisal and accepts the valuation proposed by the Town.

In view of the foregoing, the Court finds that the highest and best use of the property is for recreational or aesthetic purposes. The Court also accepts the valuation of $117,500.00 proposed by the Town as the compensation due the claimant.

Settle judgment.

/Signature/
Paul J. Baisley

APPENDIX E

Title 2 - WETLANDS INVENTORY

§ 25-0201. Inventory of tidal wetlands

1. The commissioner shall as soon as practicable make an inventory of all tidal wetlands in the state of New York. This inventory, and any restrictive orders issued pursuant to section 25-0302 of this act, shall comprise a part of the statewide environmental plan as provided for in section 3-0303 of the environmental conservation law.

2. The inventory shall set forth the boundaries of such wetlands using such photographic and cartographic standards and techniques as the commissioner may deem reasonable and appropriate in order to provide clear and accurate maps of the tidal wetlands of the state for the purpose of effectuating the policies and provisions of this act. Said boundaries shall generally delineate all tidal wetlands in the state as defined in section 25-0101 of this act. At least sixty days prior to the commencement of the inventory the commissioner shall file with the secretary of state a detailed description of the technical methods and requirements to be utilized in compiling the inventory, and he shall afford the public an opportunity to submit written comments thereon.

3. Upon completion of tentative tidal wetlands boundary map for a particular area, the commissioner or his designated hearing officer shall hold a public hearing in order to afford an opportunity for any person to purpose additions or deletions from such map. The commissioner shall give notice of such

hearing to each owner of record of all lands designated as such wetland as shown on such maps, and also to the chief administrative officer of each municipality within whose boundary any such wetland or portion thereof is located, by certified mail, return receipt requested, not less than thirty days prior to the date set for such hearing. The commissioner shall also cause notice of such hearing to be published at least once, not more than thirty days nor fewer than ten days before the date set for such hearing, in at least two newspapers having a general circulation in the area where such wetlands are located.

4. After considering the testimony given at such hearing and any other facts which may be deemed pertinent and after considering the rights of affected property owners and the policy and purposes of this act, the commissioner shall establish by order the final bounds of each such wetland. A copy of the order, together with a copy of the map depicting such final boundary lines, shall be filed in the office of the clerk of the county in which each such wetland is located. The commissioner shall simultaneously give notice of such order to each owner of all lands designated as such wetlands by mailing a copy of such order to such owner. The commissioner shall also simultaneously give notice of such order by certified mail to the chief administrative officer of each municipality within whose boundary any such wetland or portion thereof is located. The commissioner shall also cause a copy of such order to be published in at least two newspapers having a general circulation in the area where such wetlands are located.

5. Any person aggrieved by such order may seek judicial review pursuant to article seventy-eight of the civil practice law and rules in the supreme court for the county which the

tidal wetlands are located, within thirty days after the date of the filing of the order with the clerk of the county in which such wetlands are located.

6. The commissioner shall supervise the maintenance of such boundary maps, which shall be available to the public for inspection and examination. The statewide inventory shall be readjusted from time to time as may be necessary to reflect such natural changes as have occurred through erosion, accretion, and otherwise and also to reflect such other changes as have occurred as a result of the granting of permits pursuant to section 25-0403 of this act. (Added L.1973, c.790, § 2; amended L.1976. C. 598, § 1.)

§ 25-0401. Regulated activities

1. After completion of the inventory prescribed in title 2 of this article with respect to any tidal wetland, no person may conduct any of the activities set forth in subdivision 2 of this section unless he has obtained a permit from the commissioner to do so. The permit issued by the commissioner shall be in addition to, and not in lieu of, such permit or permits as may be required by any municipality within whose boundary such wetland or portion thereof is located.

2. Activities subject to regulation hereunder include any form of draining, dredging, excavation, and removal either directly or indirectly, of soil, mud, sand, shells, gravel or other aggregate from any tidal wetland; any form of dumping, filling, or depositing, either directly or indirectly, of any soil, stones, sand, gravel, mud, rubbish, or fill of any kind; the erection of any structures or roads, the driving of any pilings, or placing of any other obstructions, whether or not changing the ebb and flow of the tide, and any other activity within or immediately adjacent to inventoried wetlands which may

substantially impair or alter the natural condition of the tidal wetland area.

3. The depositing or removal of the natural products of the tidal wetlands by recreational or commercial fishing, shellfishing, aquaculture, hunting or trapping, shall be excluded from regulation hereunder, where otherwise legally permitted.

4. Activities, orders, and regulations of the department of health or of units of local government with respect to matters of public health shall be excluded from regulation hereunder, except as hereinafter provided. Copies of all such public health orders and regulations affecting tidal wetlands shall be filed with the department of environmental conservation. The commissioner may require modification of such orders or regulations if he deems it necessary to implement the policy of this act.

5. The commissioner shall review all current mosquito control projects to determine whether they are having any adverse impact on tidal wetlands. Where any adverse impact is found, the commissioner following a public hearing, may require modification of such projects if he deems it necessary to implement the policy of this act.

6. Where the dredging or filling is in the navigable waters of the state or is for the reconstruction or repair of certain dams and docks, and where such activity also substantially affects tidal wetlands, any person undertaking such activity must seek permission under this act as well as under any other applicable law.

§ 25-0404. Judicial review

Any person aggrieved by the issuance, denial, suspension or revocation of a permit may within thirty days from the date of the commissioner's order seek judicial review pursuant to article seventy-eight of the civil practice law and rules in the supreme court of the county in which the tidal wetlands affected are located. In the event that the court may find that the determination of the commissioner constitutes the equivalent of a taking without compensation and the land so regulated otherwise meets the interest and objectives of this act, it may, at the election of the commissioner either set aside the order or require the commissioner to acquire the tidal wetlands or such rights in them as have been taken, proceeding under the power of eminent domain.

APPENDIX F

SOUTHAMPTON CODE

ARTICLE VIII
Tidal Wetlands and Ocean Beach Overlay District

§ 330-39. Purpose

The tidal wetlands and the ocean beach of the Town of Southampton are a unique and relatively scarce geographic environment that makes possible an ecological system necessary to propagate the finfish and shellfish essential as a source of food and as a basis for the economic vitality of the fishery industry and recreational fishing; further, it provides the natural habitat for migratory waterfowl along the Eastern Seaboard's international flyway, and it is fundamental to the scenic character and recreational potential that supports both the tourist and recreational economies as well as the year-round resident's enjoyment of his home community. Therefore, the town enacts these provisions as a matter of public policy, recognizing the extremely insecure status of these valuable natural resources, particularly in a time of rapid technological progress and urbanization, their limited suitability for development and the interest of all its people in these geographic areas, especially as established in the Dongan Patent and in other subsequent public acts, particularly with regard to the town title to all such lands below the high-water mark, and designates those specific areas as the Tidal Wetlands and Ocean Beach Overlay District and sets forth the following regulations which shall apply to said overlay district in addition to those regulations in the

standard districts as set forth in Articles II, VI and VII, as well as in other provisions of this chapter to assure the conservation of these natural resources and their ecological systems for the enjoyment of all people of the town and to provide appropriate guidance for growth development as well as to promote the health, safety and the general welfare of the town.

§ 330-40 Tidal wetlands regulations.

A. No building other than a government facility shall be constructed or maintained on or in a public tidal wetland.

B. No structure or floating facility, including regular or permanent moorings, shall be constructed or maintained or used for living quarters on or in a public tidal wetland, except as a permitted accessory use to an adjoining on-shore parcel of land or lot, a governmental facility or other facility only when found necessary to protect the natural environment from excessive erosion, silting or an imbalance in the ecological system of the tidal wetlands, after approval by the appropriate public agencies and the Trustees of the Freeholders and Commonalty of the Town of Southampton, and except for a fishing structure, duck blind and permanent mooring established in approved areas by the Trustees of the Freeholders and commonalty of the Town of Southampton.

C. Where a private landowner presents to the town a claim to title of lands within a tidal wetland area, he shall consent to town inspection of such lands so that such tests and investigations as may be considered appropriate by the town may be made. The town shall establish whether or not such a title is satisfactory within one hundred twenty (120) days of receipt of such claim. Where such title is determined to be satisfactory, such a private landowner may fill not more than ten percent (10%) of the required minimum lot area in the applicable upland district in which such property is located for a building site, and further provided that the location of such fill shall have been approved by the Trustees of the Freeholders and Commonalty of the Town of Southampton as that which will have the least impact on the ecological system of the tidal wetlands, and also provided that it shall have the approval of all other public agencies having jurisdiction.

D. Channel construction in the tidal wetlands shall be limited to only such channels as are necessary to provide minimum boat access to contiguous upland areas and then only if no suitable substitute structure can be used for such access that would have a lesser impact on the ecological system of the tidal wetlands as established by the Trustees of the Freeholders

and Commonalty of the Town of Southampton. No such facility shall be designed or used for any purpose incompatible with standard district regulations applicable to the adjoining onshore land.

E. Bulkheads shall be prohibited in all tidal wetlands except those in the resort and Waterfront Business District or when found necessary to protect the natural environment from excessive erosion, silting or an imbalance in the ecological system of the tidal wetlands after approval by the appropriate public agencies and the Trustees of the Freeholders and Commonalty of the Town of Southampton.

ARTICLE IX
Tidal Floodplain Overlay District
[Amended 5-13-86 by L.L No. 7-1986; 12-23-86 by L.L. No. 22-1986; 9-8-87 by L.L. No. 6-1987]

§ 330-42 Purpose.

Since the recorded history of Atlantic coastal storms and hurricanes establishes the fact that flooding of the ocean beach and uplands along the bays can be anticipated with consequent danger to life and health as well as property damage and other related hazards, and whereas the Corps of Engineers has analyzed this recorded history and established the flood stages related to a standard project design hurricane appropriate for the planning of necessary protective measures or for minimizing the dangers, damage and related hazards in

connection with the flood stages in the absence of such protective measures, the town of Southampton hereby establishes a tidal Floodplain Overlay District, derived by those elevations of land that approximate the standard project design hurricane, and regulations which shall apply to said overlay district, in addition to those regulations of the standard districts set forth in Articles II, VI and VII of this chapter, to minimize the dangers, damage and related hazards resulting from such storms and to promote the health, safety and the general welfare of the town.

§ 330-43. Composition of District

The Tidal Floodplain Overlay District of the Town of Southampton shall include the areas shown as Zones A, A5, A6, A7, and A8, Zones V7 and V8 and Zone B on the Flood Insurance Rate Map prepared for the Town of Southampton by the Federal Emergency Management Agency, dated June 1, 1983, which map is on file in

the offices of the Town clerk, Building Inspector, Planning board and board of Appeals, as the same may be from time to time changed and amended.

§ 330-44. Subdivisions.

A. Layout of subdivision lots in the Tidal Floodplain Overlay district on the barrier beach shall be such that each lot in the southerly and northerly side of dune road on the barrier beach shall have a minimum width from road to water of at least one hundred fifty (150) feet, except in an approved planned residential development.

B. All proposed subdivisions (minor or major) within the tidal Floodplain Overlay district shall be reviewed and approved by the appropriate governmental agencies having jurisdiction over tidal wetlands prior to the approval of the subdivision by the Planning board.

§ 330-45. Location of buildings and structures.

B. On all other water frontages, except as provided in § 330-40, all buildings or structures shall be set back seventy-five (75) feet upland of the edge of the tidal wetland, except that an accessory building or structure may be located in such setback if the Trustees of the Freeholders and commonalty of the town of Southampton finds that it will not tend to deteriorate the ecological values of the tidal wetland, provided, also that it shall have the approval of all other public agencies having jurisdiction.

§ 330-46. Provisions for flood damage prevention.

In addition to the provisions of this Article, all development within the Tidal Floodplain Overlay District shall also comply with the provisions of chapter 169, Flood Damage Prevention, of this Code.

APPENDIX G

DECLARATION

THIS DECLARATION, made the 8th day of January, 1976, by Tuthill Associates, a partnership having its offices at 109 Main Street, Westhampton Beach, New York, c/o Joseph L. Rhodie, hereinafter referred to as the Declarant.

WHEREAS, the Declarant is the owner of Certain real property situated at Remsenburg, Town of Southampton, Suffolk county, New York, more particularly bounded and described as set forth in Schedule "A" annexed hereto, and

WHEREAS, the Declarant has made application to the Planning Board of the Town of Southampton for approval to subdivide the said real property into four (4) parcels, bounded and described as set forth in Schedule "A" annexed hereto, and

WHEREAS, the Planning Board of the Town of Southampton is not willing at this time to approve Parcel No. 4 as described on Schedule A as a building lot because it may consists of wetlands and may not be suitable for erection of a dwelling thereon, and

WHEREAS, the Declarant desires to have Parcels No. 1, 2 and 3 as described on Schedule A approved as building lots at this time, even if said parcel No. 4 is not suitable for a building lot, and

WHEREAS, the Planning Board of the Town of Southampton is willing to approve said Parcel No. 1, 2 and 3 as building lots, provided that Parcel No. 4 is not approved as a building lot at this time, such that it cannot be built upon without a new application for approval as a building lot being made to and thereafter approved by the Planning Board of the Town of Southampton, and

WHEREAS, for and in consideration of the granting of said approval, the Planning Board of the Town of Southampton has deemed it to be for the best interests of the Town of Southampton and the owners and prospective owners of said parcels that the within covenants and restrictions be imposed on said parcels, and as a condition of said approval said Planning Board has required that the within Declaration be recorded in the Suffolk County Clerk's Office, and

WHEREAS, the Declarant has considered the foregoing and determined that the same will be for the best interests of the Declarant and subsequent owners of said parcels,

NOW, THEREFORE, THIS DECLARATION WITNESSETH:

That the Declarant, for the purpose of carrying out the intentions above expressed, does hereby make known, admit, publish, covenant and agree that the said premises herein described shall hereafter be subject to the following covenants which shall run with the land and shall be binding upon all purchasers and holders of said premises, their heirs, executors, legal representatives, distributees, successors and assigns, to wit:

1. That no building or structure shall be erected on Parcel No. 4 as described on Schedule A, unless and until said Parcel No. 4 is approved as a building lot by the Planning Board of the Town of Southampton.

2. That no structure shall be erected closer than 100 feet from the mean high water mark of Moriches Bay on Parcel No. 3.

3. That no overhead utility poles shall be erected on the said four parcels herein described.

4. That on Parcel No. 3, the 50 foot strip of land lying immediately north of the mean high water line of the Moriches Bay between Parcel No. 4 as described in Schedule A on the east and land now or formerly of Eugene Warren on the west shall be maintained in its natural state or on a state sufficient to prevent the lateral movement of silts and fertilizers.

5. That the within Declaration may not be annulled, waived, changed, or modified, unless and until approved by resolution of the Planning Board of the Town of Southampton, or its successors.

IN WITNESS WHEREOF, the Declarant above named has executed the forgoing Declaration the day and year first above written

TUTHILLL ASSOCIATES
By:/signature/
Joseph L. Rhodie

STATE OF NEW YORK
COUNTY OF SUFFOLK

On this 9th day of January in the year nineteen hundred and seventy-six before me personally came Joseph Rhodie to me known and known to me to be a member of the partnership of Tuthill Associates the partnership described in, and which executed, the foregoing instrument and said Joseph L. Rhodie acknowledged that he executed the foregoing instrument for and in behalf of said partnership.

/Signature/
Robert Paul Dillon, Notary Public, State of New York
No. 30-6035135
Qualified in Suffolk County
Term Expires March 30, 1996

SCHEDULE "A"
MAP OF PROPERTY

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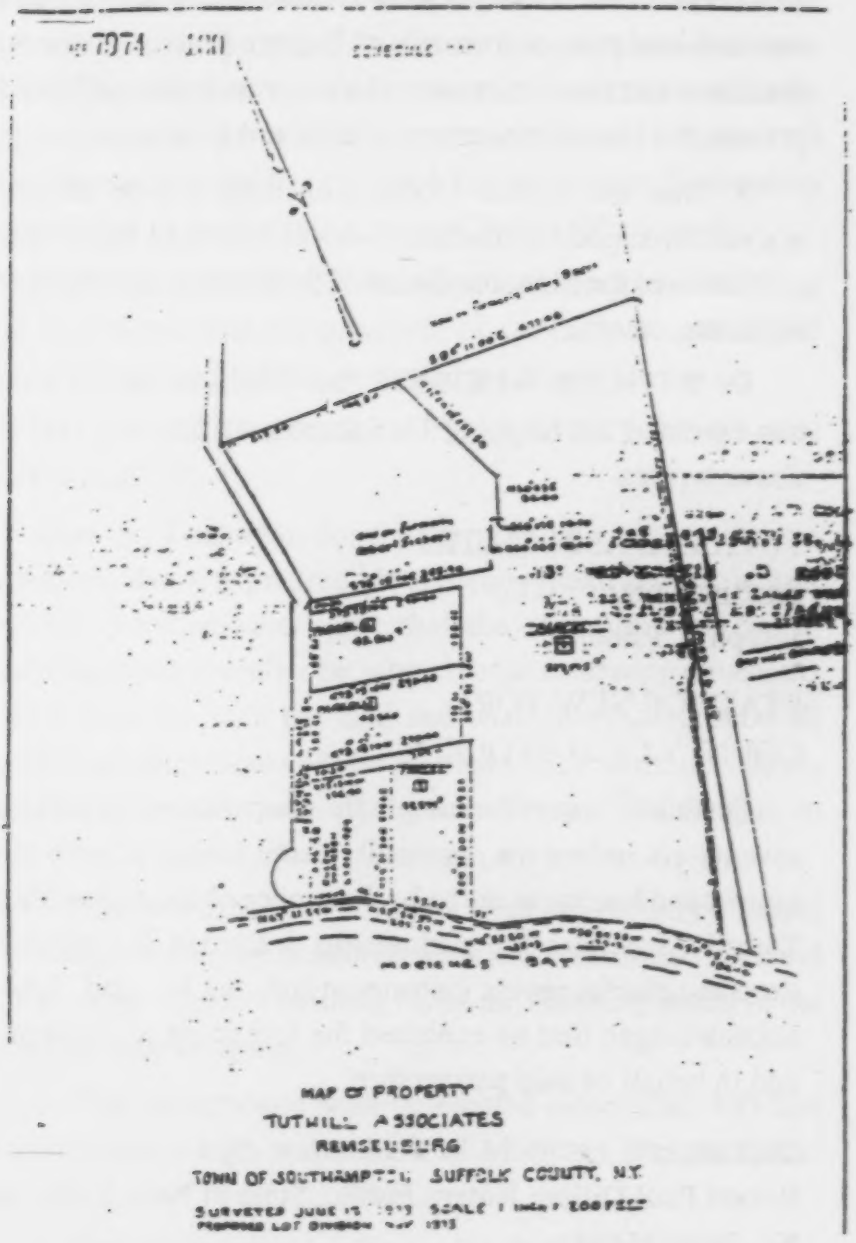

MAP OF PROPERTY
TUTHILL ASSOCIATES
REMSENBURG
TOWN OF SOUTHAMPTON SUFFOLK COUNTY, N.Y.

BEST AVAILABLE COPY